In The

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 352

CIVIL

COUNTY OF THURSTON IN THE STATE OF NEBRASKA, ET AL., PETITIONERS,

V.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ALFRED D. RAUN,
County Attorney of Thurston County,
WALTER R. JOHNSON,
Attorney General of Nebraska,
H. EMERSON KOKJER,
Deputy Attorney General of Nebraska,
Counsel for Petitioner.

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No._____

CIVIL

THE COUNTY OF THURSTON, IN THE STATE OF NEBRASKA; DWIGHT MORGAN, LESTER GUSTIN, AND THOMAS FREY, AS MEMBERS OF THE BOARD OF EQUALIZATION OF SAID COUNTY; JAMES S. TATE, AS COUNTY ASSESSOR AND AS A MEMBER OF THE COUNTY BOARD OF EQUALIZATION; FLOYD E. GRIFFIN, AS COUNTY CLERK AND AS A MEMBER OF THE COUNTY BOARD OF EQUALIZATION; AND AMY JACKSON, AS COUNTY TREASURER OF SAID COUNTY, PETITIONERS,

V.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

The petition of the County of Thurston in the State of Nebraska, et al., respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The United States of America filed four complaints (R1, 12, 19, 27) which were consolidated for trial and appeal (R50, 151), seeking to enjoin the levy and collection of taxes in the future upon land owned in fee simple by individual Indian citizens of Nebraska by the County of Thurston, which taxes were levied in compliance with the constitution and laws of the state upon all property uniformly by value for the support of necessary governmental functions of the county, the state, school districts and municipalities.

The lands involved had been upon the tax rolls of the state and its governmental subdivisions for many years, most of them had been previously owned by white people, and it was conceded that all of these lands would still be subject to taxation unless they could be relieved therefrom under authority of the Act of Congress of June 20, 1936 (49 U. S. Stat. 1542), as amended on May 19, 1937 (50 U. S. Stat. 188) Title 25 U. S. C. A. Sec. 412a, which are set out in full on pages 11-12 of the brief herein (R103, Par. 9). This law as amended purported to exempt from state taxation "homesteads" purchased by Indians out of restricted funds, and held subject to restrictions against alienation.

Approximately 24% of the residents of Thurston County, Nebraska, are Indians, and 24% of all farm lands in the county are Indian lands that is, "trust" or "allotted" lands, title to which remains in the federal

government (R70, Par. 4). Such lands are admittedly exempt from taxation, except that in the Brown Bill, 39 Stat. 865, congress provides that the county may levy taxes on certain of this land, but no lien should attach, and if a statement were filed in the office of the County Treasurer at the end of the year that the Indian had no funds available with which to pay the tax, it must be cancelled (R, last half p. 53; first half p. 54). The taxes paid under this set-up are negligible (R, table at bottom of p. 68).

The act involved here would exempt a large additional amount of land.

Please look at Exhibits 2-E and 2-F (R73-74), and consider the following facts: The Indians in these school districts being citizens, vote for all school bond and special tax levies (R71, Par. 5), and receive all of the local governmental benefits plus the benefits given by the federal government. The tribal and Brown Bill lands are not liable for the payment of any taxes, nor for the retirement of the bonds. The area marked "white land" includes that owned in fee simple by individual Indians, and which has heretofore been subject to taxation. The act here involved would exempt from taxation the Indians' homes, but would shift the burden of school district bonds and all other taxes to his white neighbor's home up to the constitutional limit, and then it would deprive the school district and all other taxing units of their necessary support.

In School District 16 Indian lands held in trust, and consequently untaxable, constitute 43% of the area. This school district has found it impossible to maintain

its school. The school board has so far provided school privileges only by accepting help from the Indian Agency, which in return therefor has taken over duties imposed by state law upon the school board. (Testimony, Gabe E. Parker, Superintendent Indian Agency, R. bottom half p. 63.)

Recovery was also prayed of taxes paid for the years 1936 to 1939, inclusive. These taxes had been distributed as required by state law to the state and the several school districts and municipalities within the county (R71, Par. 6). The state, the school districts and the municipalities were not made parties to the complaint.

Defendant contended: 1. that congress lacked constitutional power to prevent a state and its subdivisions from taxing real estate owned by any individual citizen in fee simple, either by labeling it an instrumentality of the federal government or any other device; 2. that in no event would congress have power to pass a valid statute which would cripple or destroy necessary functions of a local or state government and which discriminates between citizens, and between governmental subdivisions; 3. that the act was being construed so as to exempt from taxation properties which were not homesteads; and 4. that taxes paid by any private citizen could be recovered only by following the simple method provided by state statutes in connection with which the cities, school districts and other subdivisioins, to which the taxes had been distributed, would be indispensable parties.

The district court found generally on all points for the plaintiff, wrote an opinion (R79) and entered four

decrees (R126, 130, 133, 139). Upon appeal, the United States Circuit Court of Appeals for the Eighth Circuit on May 22, 1945, affirmed (R161).

B.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The first two of the issues just mentioned were decided adversely to petitioners herein by extending the decision of this court announced in *Board of County Commissioners* v. *Seber*, 318 U. S. 705, 63 Sup. Ct. 920, 87 L. Ed. 807. That was the first case and so far is the only case in which the validity of the acts in question was ever considered by this court. That decision may have been justified upon the facts in that particular case and in view of the enabling act of the State of Oklahoma in which there was reserved in congress power to legislate relating to the land of Indians in that state, the constitution of that state and the decision of the Supreme Court of Oklahoma in *Wynn* v. *Fugate*, 149 Okla. 210, 299 Pac. 890, holding that this reservation of power included the power to remove land owned by individual Indians from the state tax rolls. Petitioners respectfully point out that the broad language in the opinion of the court in the Seber case at the top of page 715 in 318 U. S. Reports, to-wit: "The acts of 1936 and 1937 are constitutional" is not justified for application in those states unrestricted by an enabling act coupled with a decision of their own state supreme court similar to that of Oklahoma, nor to cases based upon facts similar to the facts in this particular case. Further than that, the holding in the Seber case is not sustained by the authorities cited by the court as a foundation.

This question of constitutional law and construction of a federal statute was probably wrongly decided by the lower court. It is of extreme importance to a great many states and the citizens thereof and should be re-examined and modified, or its application properly limited.

The third issue is an important question of federal law which has not been but should be settled by this court. It involves the proper construction and application of a federal statute.

By act of June 20, 1936 (49 Stat. at Large 1542) congress purported to exempt from taxation *"all land"* subject to restrictions against alienation, owned by an Indian. In the House Committee report upon the bill to amend this act it was said: "Under this mistaken legislation great quantities of otherwise taxable property such as *business buildings, farm lands which are not homesteads*, etc., are exempt from taxation." Congress thereupon amended the act to exempt *"all homesteads* heretofore purchased * * *," and by proviso limited the size of the tract which could be claimed for a homestead to one hundred sixty acres of agricultural land, or to town property which had cost not to exceed five thousand dollars.

The lower court disregarded completely the restriction inherent in the word "homesteads" and construed the act as though it read "every Indian may claim as exempt one hundred sixty acres of agricultural land or any town property costing not to exceed five thousand dollars."

Under this construction many tracts which are not homesteads were held to be exempt from taxation.

This question of construction and application of a federal statute is one of great importance in all of the many states where Indians reside. It probably has been incorrectly decided in the lower court and should be examined and correctly decided by this court as a guide for the proper administration of this act in those states where the act may be found applicable.

The fourth issue involves an important question of general law of great public interest which probably was incorrectly decided by the lower court, contrary to the law of the State of Nebraska and to decisions of its Supreme Court.

An Indian citizen living off of the reservation in Thurston County, Nebraska, is in the same position as any other citizen, so far as his duty to follow the laws of the state are concerned. There is no transfer of privilege or immunity from a guardian to a ward by the mere establishment of the relationship, and an Indian does not become a sovereign invested with all of the privileges and immunities claimed by the sovereign upon becoming the ward of the sovereign. This point is further developed in the brief where pertinent evidence is quoted and citations of authority set out.

Possibly it has nothing to do with the decision, but many of the cases dealing with Indians contain romantic and sentimental reference to the plight of these poor people who were so ill-treated by the white man in the early days. In the same mood Congress has now in effect said to the Indians "if you need a shirt, we will furnish it," then has done so by taking the shirt off of the back of the Indian's white neighbor.

The sentiment is all right, the furnishing of the shirt is all right, but it can be done, and it must be done, under our constitution, at the expense of the entire nation instead of at the expense of the Indians' white neighbors in Thurston County and in other counties similarly situated, and without imposing an undue and discriminatory burden upon the State of Nebraska and its local governmental units.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 13,007, Civil, *County of Thurston in the State of Nebraska, et al., Appellant,* v. *The United States of America, Appellee,* and that the said decree of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

THE COUNTY OF THURSTON IN THE STATE OF NEBRASKA, ET AL.,

By: ALFRED D. RAUN,
County Attorney of Thurston County,
WALTER R. JOHNSON,
Attorney General of Nebraska,
H. EMERSON KOKJER,
Deputy Attorney General of Nebraska,
Counsel for Petitioners.